RECORD AND BRIEFS

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In the

Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,
Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, MONTANA CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community. The U.S. Chamber has participated as *amicus curiae* in every significant personal jurisdiction case recently decided by this Court, including *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), and *Walden v. Fiore*, 134 S. Ct. 1115 (2014), and has filed briefs in a host of lower federal and state court cases applying those decisions. The U.S. Chamber's recent *amicus curiae* briefs in personal jurisdiction cases are available at http://www.chamberlitigation.com/cases/issue/jurisdiction-procedure/personal-jurisdiction.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the brief's preparation or submission. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

The Montana Chamber of Commerce ("Montana Chamber") is Montana's largest business federation, representing more than 1,500 business members ranging from small, mom-and-pop operations to large corporations. Member businesses participate in virtually every sector of the economy, including retail, manufacturing, tourism, and agriculture. The Montana Chamber works to improve Montana's business climate. As part of its mission, the Montana Chamber files briefs as *amicus curiae* in order to provide courts with the perspective of the broader business community on issues relevant to Montana's ability to attract private sector investment. Indeed, given the importance of this case, the Montana Chamber previously filed an *amicus curiae* brief in support of petitioner with the Montana Supreme Court.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association. Founded in 1943 as a nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB's Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will affect small businesses.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their

resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases that have addressed important liability issues.

SUMMARY OF ARGUMENT

This Court made unmistakably clear in *Daimler AG v. Bauman* that a state court may subject a defendant to general personal jurisdiction only where the defendant's "affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Court explained that, absent "exceptional" circumstances, a "foreign corporation" is "at home," and thus subject to "all-purpose" jurisdiction, only in the states in which it is incorporated and where it has its principal place of business. *Id.* at 760-61 & n.19; *see also Goodyear*, 564 U.S. at 924. And the Court left no doubt that its references to "foreign corporations" and the Due Process Clause extend equally to corporations based in a "sister-state" as well as "foreign-country" corporations. *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919).

Thus, when respondents—neither of whom are residents of Montana—sued Texas-based petitioner BNSF Railway Company in Montana for claims having no relation to Montana, the cases should have been swiftly dismissed, with the dismissals just as swiftly affirmed on appeal. To be sure, before this Court's recent decisions, BNSF's normal course of

business in Montana might have been mistakenly viewed as sufficient to subject the company to general personal jurisdiction there. But *Daimler* explicitly rejected the notion that a company's "substantial, continuous, and systematic course of business" in a forum could be enough to subject a company to personal jurisdiction on any claim arising anywhere in the world. *Id.* at 761. Indeed, *Daimler*'s rejection of that view of jurisdiction as "unacceptably grasping," *id.*, should have led the Montana Supreme Court to conclude that BNSF is not subject to general personal jurisdiction in Montana.

But old habits die hard, and the Montana Supreme Court "decline[d]" to apply *Daimler*'s straightforward teaching. Pet.App.15a. Instead, the court asserted that the decision had no purchase in BNSF's case because *Daimler* addressed only the narrow question of "the authority of a court in the United States to entertain a claim brought by *foreign* plaintiffs against a *foreign* defendant based on events occurring entirely *outside the United States*." Pet.App.11a (emphases added). And because BNSF is a U.S.-based defendant, the Montana high court believed that *Daimler* was "factually and legally distinguishable." Pet.App.15a.

As dissenting Justice McKinnon cogently explained, that reasoning is spectacularly flawed. Pet.App.20a-33a. Neither *Daimler* nor the guarantees of the Due Process Clause are limited to international defendants. Indeed, the Court made explicit that its holding applies to both "sister-state" and "foreign-country ... corporations." *Daimler*, 134

S. Ct. at 754. The Montana Supreme Court's contrary conclusion cannot stand.

The Montana Supreme Court's other rationale for subjecting BNSF to general personal jurisdiction in Montana is equally confounding. Respondents alleged violations of the Federal Employers' Liability Act (FELA), which creates a right of action for railroad employees against their employers for injuries that occur on the job. FELA contains a special venue provision that gives plaintiffs a broad selection of federal-court venues, and makes clear that state and federal courts have "concurrent jurisdiction" to hear the federal claims. 45 U.S.C. §56. The Montana Supreme Court held that this *venue* provision "make[s] a railroad 'at home' for *jurisdictional* purposes wherever it is 'doing business.'" Pet.App.12a (emphasis added). But that reasoning mixes apples and oranges. Venue and jurisdiction are fundamentally different matters. "[P]ersonal jurisdiction ... goes to the court's power to exercise control over the parties" and is thus "typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). Moreover, personal jurisdiction, unlike venue, is a fundamental *constitutional* prerequisite for the exercise of adjudicators' power. In short, personal jurisdiction is distinct from venue; when a court cannot exercise personal jurisdiction, that court can never be the appropriate, convenient venue because the court must dismiss the case; and FELA did not and could not expand a state court's power to subject out-of-state defendants to its jurisdiction. Construing FELA otherwise would raise grave

constitutional concerns, counseling strongly in favor of interpreting the relevant FELA provision as this Court has always interpreted it—as a venue provision.

The Montana Supreme Court's conception of general personal jurisdiction is not only irreconcilable with this Court's precedent. It also raises exactly the kinds of unfairness problems that this Court sought to rectify in its previous personal jurisdiction holdings. The Court has repeatedly recognized the practical need for simple and fair jurisdictional rules, and *Daimler*'s test for determining where a defendant is subject to all-purpose jurisdiction fits that bill. These predictable rules help potential defendants structure their conduct, guide potential plaintiffs to an appropriate forum for litigation, and assist all parties (including courts) in efficiently litigating the actual merits of their claims, rather than engaging in costly threshold disputes over where the claims can be heard. Montana's novel approach, on the other hand, demands fact-intensive jurisdictional inquiries and subjects nearly every company that does some business in Montana to the risk that it could be haled into a Montana court for any action it takes anywhere in the world, all premised on the notion that Congress can authorize what the Constitution forbids. The resulting uncertainty fosters massive inefficiencies and is critically unfair for defendants, especially for small businesses, which frequently lack the resources to adequately defend themselves in expensive litigation in distant and unfamiliar forums.

Finally, this case unfortunately is not an isolated anomaly. The Montana court has repeatedly relied on tenuous readings of this Court's precedents to try to exempt the state from rulings of this Court with which it disagrees. And this Court has repeatedly and justifiably rejected those efforts, making clear that the Constitution applies with full force in Montana as it does in every other State. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012). The Montana Supreme Court's attempts to distinguish *Daimler* here are similarly unavailing and warrant the same result. Indeed, the decision below is of a piece with other recent decisions by state supreme courts circumventing this Court's jurisdictional rulings on the flimsiest of grounds. These decisions signal a troubling trend that threatens to undo this Court's jurisprudence and reflects a return to old ways and engrained habits that deny defendants due process. The Court should arrest this nascent movement by soundly repudiating the Montana Supreme Court's decision and holding that constitutional due process is not subject to geographic or statutory carve-outs.

ARGUMENT

I. The Montana Supreme Court's Decision Ignores This Court's Clear Holdings Regarding General Personal Jurisdiction.

The Due Process Clause of the Fourteenth Amendment prohibits a state from authorizing its courts to exercise personal jurisdiction over an out-of-state defendant unless the defendant has "certain minimum contacts with the State such that the maintenance of the suit does not offend 'traditional

notions of fair play and substantial justice.'" *Daimler*, 134 S. Ct. at 754 (brackets omitted) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *see also* Fed. R. Civ. P. 4(k)(1)(A) (permitting district court jurisdiction over defendant subject to jurisdiction in court of forum state).

"[T]wo categories of personal jurisdiction" guide the application of the minimum contacts test. *Daimler*, 134 S. Ct. at 754. Specific personal jurisdiction applies when the suit "arises out of or relates to the defendant's contacts with the forum." *Goodyear*, 564 U.S. at 923-24 (brackets omitted). For a state to exercise specific personal jurisdiction consistent with due process, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

General personal jurisdiction, on the other hand, allows a court to hear "any and all claims against [the defendant]." *Daimler*, 134 S. Ct. at 751. For this "all-purpose" jurisdiction to be appropriate, however, the defendant's "affiliations with the State in which suit is brought" must be "so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Id.* (quoting *Goodyear*, 564 U.S. at 919). Absent "exceptional" circumstances, a corporation is "at home," and thus subject to general jurisdiction, only in the states in which it is incorporated and where it has its principal place of business. *Id.* at 760-61 & n.19; *see also Goodyear*, 564 U.S. at 924.

Daimler put to rest the misconception that state courts could exercise general personal jurisdiction

based merely on "activities in the forum [that] are 'substantial' or 'continuous and systematic.'" *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (9th Cir. 2011). Rejecting that approach as "unacceptably grasping," the Court clarified that the relevant inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 761 (brackets omitted) (quoting *Goodyear*, 564 U.S. at 919). Subjecting defendants to general jurisdiction in any other state "would not accord with the 'fair play and substantial justice' due process demands." *Id.* at 763 (quoting *Int'l Shoe*, 326 U.S. at 316).

The Montana Supreme Court's decision blatantly disregards this clear teaching. Petitioner BNSF is a Delaware corporation with its principal place of business in Texas. Plaintiffs sued BNSF not in Delaware or Texas, but in Montana on tort claims that are unrelated to any of BNSF's activity in Montana. Pet.App.3a-4a. BNSF argued that the cases should be dismissed for lack of personal jurisdiction, but the Montana Supreme Court disagreed. Parroting the plaintiffs in *Daimler*, the court held that BNSF could be subject to general personal jurisdiction because "BNSF maintains substantial, continuous, and systematic contacts with Montana." Pet.App.17a. To explain away this Court's recent, on-point decision in *Daimler*, the court asserted that *Daimler* addressed only "the authority of a court in the United States to entertain a claim brought by *foreign* plaintiffs against a *foreign*

defendant based on events occurring *entirely outside the United States*." Pet.App.11a (quoting *Daimler*, 134 S. Ct. at 750) (emphases added). The Montana Supreme Court concluded that because plaintiffs' claims did not involve a defendant from outside the United States or "torts that occur[red] in foreign countries," *Daimler* was "factually and legally distinguishable," and Montana state courts could exercise general personal jurisdiction over BNSF. Pet.App.11a, 15a.

That reasoning is spectacularly flawed. The Montana Supreme Court's tenuous justification for "declin[ing]" to follow the clear meaning of *Daimler* is profoundly misguided at best, and willfully defiant at worst. Pet.App.15a. Nothing in *Daimler* remotely suggests that its holding regarding defendants' due process rights is limited to only international defendants (*i.e.*, those with the most tenuous basis to claim the protections of the Due Process Clause of the United States Constitution, *cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990)), or transnational torts. To the contrary, the Court made clear that the Due Process Clause protects *all* "out-of-state defendants" from "exorbitant exercises of all-purpose jurisdiction." *Daimler*, 134 S. Ct. at 761-62. The Court even made explicit that, when it referred to "foreign" defendants, it meant foreign in the sense relevant for the personal jurisdiction inquiry, namely, any out-of-state defendant, whether based in a "sister-state" or a "foreign-country." *Id.* at 754. There is no basis in the Constitution, this Court's decisions, or common sense for limiting due process protections to only the latter group.

The Montana Supreme Court's decision is even more inexplicable considering how many other federal courts of appeals and state courts of last resort have recognized that "*Daimler* makes clear the demanding nature of the standard for general personal jurisdiction over a corporation." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014); *see, e.g.*, *Kipp v. Ski Enter. Corp. of Wis.*, 783 F.3d 695, 698 (7th Cir. 2015) (noting *Daimler*'s "stringent criteria"); *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (noting that, in light of *Daimler*, it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business"). Thus, "except in a truly 'exceptional' case, a corporate defendant may be treated as 'essentially at home' only where it is incorporated or maintains its principal place of business." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016).

The Montana Supreme Court, however, never suggested that BNSF's case was in any way "exceptional," *Daimler*, 134 S. Ct. at 761 n.19, nor would there have been any grounds for such a holding. This Court has identified only one such "exceptional case"—*Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). *Perkins* involved a Philippines-based corporation that temporarily conducted its business from Ohio during the Japanese occupation of the Philippines in World War II. *Daimler*, 134 S. Ct. at 756 & n.8. The *Perkins* Court held that the company's contacts with Ohio were so continuous and systematic that "Ohio could be considered 'a surrogate for the place of incorporation or head office.'" *Id.* But *Perkins* is the

proverbial exception that proves the rule. Its circumstances are so "exceptional" that, post-*Daimler*, *amici* are aware of no federal circuit court that has permitted an exercise of otherwise unconstitutional general personal jurisdiction under the "exceptional circumstances" carve-out. And given that BNSF operates rail lines in 28 states, Br. for Pet'r 9, "general jurisdiction would be quite the *opposite* of 'exceptional' if such contacts were held sufficient to render the corporation 'at home' in the state." *Brown*, 814 F.3d at 630. Yet the Montana Supreme Court held that BNSF is "at home" in Montana only because it is "doing business" there, Pet.App.12a, a clear confirmation that the court's decision cannot be squared with any reasonable reading of *Daimler*.

II. The Federal Employers' Liability Act Does Not And Could Not Permit The Exercise Of Personal Jurisdiction That The Constitution Prohibits.

The Montana Supreme Court further held that respondents' suits were permissible in Montana state courts because they arose under the Federal Employers' Liability Act (FELA). Thus, according to the Montana Supreme Court, Congress in FELA authorized a state court to exercise general personal jurisdiction over an out-of-state defendant not "at home" in that state. But Congress did no such thing, and if it had, such authorization would be unconstitutional.

FELA makes railroads liable to their "employees in damages for injuries resulting in whole or in part from the fault of 'any of the officers, agents, or

employees' of such carrier." *Sinkler v. Mo. Pac. R.R. Co.*, 356 U.S. 326, 328 (1958) (quoting 45 U.S.C. §51). FELA was initially subject to the general venue statute, which fixed venue for suits brought in federal court in the district in which the defendant resided. *See Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Congress later added a venue provision to FELA that provides that plaintiffs may file "in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. §56. The same section also makes clear that state courts can entertain FELA actions by providing that "[t]he jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." *Id.* That language was added to abrogate *Hoxie v. New York, New Haven & Hartford Railroad Co.*, 73 A. 754 (Conn. 1909), which had held that the federal courts had exclusive jurisdiction over FELA actions. *See Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 56 (1912).

It is hornbook law that "[t]he question of personal jurisdiction ... goes to the court's power to exercise control over the parties," while the question of "venue ... is primarily a matter of choosing a convenient forum." *Leroy*, 443 U.S. at 180. "This basic difference between the court's power and the litigant's convenience is historic in the federal courts." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). And it is equally well-established in the Montana courts. Indeed, as

recently as 2014, the Montana Supreme Court explicitly recognized that "[p]ersonal jurisdiction and venue are distinct concepts," and "one does not control the other." *In re Guardianship of H.O.*, 337 P.3d 91, 93 (Mont. 2014). "It is possible for jurisdiction to exist though venue is improper, and it is possible for a suit to be brought in an appropriate venue though it must be dismissed for lack of jurisdiction." *Id.*

That black-letter distinction was apparently lost on the Montana Supreme Court here. Instead, the court seized on FELA's venue provision in 45 U.S.C. §56 as a proxy for personal jurisdiction, concluding that "Congress drafted the FELA to make a railroad 'at home' for jurisdictional purposes wherever it is 'doing business.'" Pet.App.12a. This reasoning represents a clear and erroneous conflation of venue and jurisdiction. Venue provisions like 45 U.S.C. §56 do not (and cannot) expand personal jurisdiction; rather, they "come into play only after jurisdiction has been established." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 793 n.30 (1985). Thus, "Congress did not confer personal jurisdiction with the passage of 45 U.S.C. §56." Pet.App.29a (McKinnon, J., dissenting).

The Montana Supreme Court's error is particularly mystifying because this Court has repeatedly recognized that §56 is a "venue act," *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947), that grants the plaintiff "[t]he right to select the forum," *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949). Indeed, in *Kepner*, the Court implicitly recognized that FELA addresses only venue when it

noted that FELA "establishes venue for an action in the federal courts," 314 U.S. at 52, while recognizing that defendants must face FELA actions only "if there is jurisdiction" as well, *id.* at 51.

Attempting to avoid this obvious conclusion, the Montana Supreme Court resorted to equivocation, noting that "45 U.S.C. §56 does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction." Pet.App.14a. But as Justice McKinnon recognized in her dissent, "'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." Pet.App.30-31a (citing statutory and judicial authorities).

Thus, this Court has repeatedly contrasted "concurrent jurisdiction" with "exclusive federal court jurisdiction over cases arising under federal law," a comparison that turns on the *nature* of the claim, not the *territory* or court in which the claim is properly brought. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962); *see also Tafflin v. Levitt*, 493 U.S. 455, 467-68 (1990) (discussing whether "Congress intended exclusive federal jurisdiction" or "concurrent state court jurisdiction" over federal RICO claims); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) ("[I]f exclusive jurisdiction [in the federal courts] be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."). And the case law is clear that the language invoked by the Montana Supreme Court was added

to FELA to confirm that state courts had *subject-matter* jurisdiction over FELA suits. *See Mondou*, 223 U.S. at 56. Finally, while Congress has an obvious and legitimate interest in specifying whether federal causes of action can be brought in state court (*i.e.*, addressing subject-matter jurisdiction), it has no obvious business dictating the personal jurisdiction rules of state courts; indeed, doing so raises serious constitutional questions. *See* pp. 17-19, *infra*. Thus, the Montana Supreme Court's indefensible misreading (or willful mischaracterization) of "concurrent jurisdiction" does not support a conclusion that §56 of FELA authorizes general personal jurisdiction over defendants like respondent—or, for that matter, that Congress meant to do anything with respect to personal jurisdiction when it enacted that provision.

The Montana Supreme Court claimed to identify "decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" Pet.App.12a. But as Justice McKinnon correctly noted, the majority "arrive[d] at this conclusion *without citing a single* general jurisdiction case." Pet.App.27a. Instead, the majority relied on two decisions that involved only the issue of whether state courts could enjoin an otherwise legitimate FELA action filed in another state court on grounds that the plaintiff's choice of venue was oppressive or inconvenient, *see Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 383 (1953); *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 699 (1942), and one decision that concerned whether allowing a FELA action to proceed would impose "an undue burden on interstate commerce,"

Denver & Rio Grande W. R.R. Co. v. Terte, 284 U.S. 284, 285 (1932). "These cases do not so much as mention the Due Process Clause or general jurisdiction." Pet.App.28a (McKinnon, J., dissenting).

The Montana Supreme Court's vague appeals to "FELA's purpose" likewise fail to justify the court's reading of the statute. Pet.App.14a. The court noted that if FELA did not empower state courts to hear out-of-state cases against out-of-state defendants, then even a Montana resident would not be able to sue BNSF in Montana state court, a result the court found irreconcilable with "FELA's purpose" of minimizing travel for plaintiffs. *Id.* (citing *Kepner*, 314 U.S. at 49-50). But due process often demands that plaintiffs file suit outside their home state. *See, e.g., Walden*, 134 S. Ct. at 1124 (dismissing for lack of personal jurisdiction a suit by Nevada residents in Nevada despite plaintiffs' "strong forum connections"). And FELA need not deprive defendants of their due process rights to advance its purpose of easing litigation burdens for plaintiffs.

It is clear, therefore, that with FELA, Congress did not authorize state courts to assert personal jurisdiction over out-of-state defendants with no connection to a forum state. It is equally clear, however, that if that were what Congress intended in enacting 45 U.S.C. §56, the statute would be unconstitutional. The Due Process Clause's "personal jurisdiction requirement recognizes and protects an individual liberty interest." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). This right to be free from "the burdens of litigating in a distant or inconvenient

forum" is not a second-class right that can be stripped from defendants by Congress. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Rather, just as Congress cannot empower states to abolish jury trials or inflict cruel and unusual punishments, Congress cannot grant states the power to override the Fourteenth Amendment's "restriction on judicial power." *Ins. Corp. of Ir.*, 456 U.S. at 702.

Two canons of statutory construction, however, render it unnecessary for the Court to decide the ultimate question of whether there is some principle that permits Congress, in FELA or elsewhere, to empower state courts to override the due process rights of defendants. First and foremost, "[i]t is a cardinal principle of statutory interpretation ... that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quotation marks omitted); *see also, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). There can be no serious dispute that reading §56 to authorize a state court to exercise general personal jurisdiction over a defendant not "at home" in that state "raises a serious doubt" as to the provision's constitutionality. Construing §56 as "a venue statute for the federal courts, not a grant of personal jurisdiction to state courts," Pet.App.29a (McKinnon, J., dissenting), thus is not only eminently plausible, *see, e.g.*, *S. Pac. Transp. Co. v. Fox*, 609 So.2d 357, 362-63 (Miss.

1992) ("Nothing in [FELA] addresses the matter of personal jurisdiction in the state court."); it avoids the "multitude of constitutional problems," *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005), that arise under the contrary interpretation endorsed by the Montana Supreme Court and respondents.

Second, "as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *St. Cyr*, 533 U.S. at 299. Considering that the personal jurisdiction of *federal* courts is generally governed not by statutes directly addressing personal jurisdiction but by the Federal Rules of Civil Procedure and statutes addressing service of process, *see* Br. for Pet'r 30-33, a statute directly authorizing *state* courts to exercise personal jurisdiction surely implicates the "outer limits" of Congress' power. Yet FELA contains no "clear indication" that Congress intended to confer personal jurisdiction on state courts. Section 56 is thus far better read as speaking to venue—like a number of other federal statutes, *see id.* at 32-33—and not personal jurisdiction.

III. The Montana Supreme Court's Decision Reintroduces The Unfairness And Uncertainty This Court Has Sought To Eliminate.

"The Due Process Clause, by ensuring the 'orderly administration of the laws,' ... gives a degree of predictability to the legal system" for potential defendants. *World-Wide Volkswagen*, 444 U.S. at 297 (quoting *Int'l Shoe*, 326 U.S. at 319). And, as the Court has noted, "[p]redictability is valuable to

corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). *Daimler* promoted this predictability for defendants, recognizing that it "is one thing to hold a corporation answerable for operations in the forum State, ... quite another to expose it to suit on claims having no connection whatever to the forum State." 134 S. Ct. at 761 n.19. After all, if corporations could be subjected to all-purpose jurisdiction for merely doing "substantial, continuous, and systematic" business in a state, it would be well-nigh impossible for them "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

The Montana Supreme Court cast aside these concerns when it resurrected the "substantial, continuous, and systematic contacts" standard for U.S.-based defendants by means of a statutory carve-out. Pet.App.17a. By allowing "exorbitant exercises of all-purpose jurisdiction," the decision below has created uncertainty for all U.S. businesses operating in Montana, as they face the prospect of being haled into Montana courts to answer for conduct that occurs anywhere in the world. And each day the decision stands, that uncertainty grows for all companies operating in the United States, as the Montana decision serves as a template for enterprising plaintiffs and courts that would seek to limit *Daimler* to only certain causes of action or certain classes of "foreign" defendants in an effort to gain entry to plaintiff-friendly forums. *See, e.g.*, *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d

319, 333 (W. Va. 2016) (noting that that "the Court in *Daimler* paid significant attention to the 'transnational context' of the dispute" and remanding for jurisdictional discovery).

The predicament that a company like BNSF now faces illustrates one of the practical reasons for concluding that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20. BNSF operates in 28 states and 2 Canadian provinces. Br. for Pet'r 9. Only about 2,000 of the 32,500 miles of railroad track that BNSF operates are located in Montana, and less than 10% of the company's revenue is generated there. Pet.App.63a. But because the Montana Supreme Court carved a gaping hole in *Daimler*, BNSF and other similarly situated defendants can expect to be haled into Montana at least for virtually all FELA claims. Indeed, BNSF is currently facing some three dozen FELA suits just in Montana, which has become a magnet for FELA suits given its plaintiff-friendly procedural and substantive FELA law. *See* Br. for Pet'r 10-13. The unfairness to out-of-state defendants is compounded by the fact that Montana has some of the strictest *pro hac vice* rules in the country; no attorney *or law firm* may appear *pro hac vice* in Montana state court more than twice—ever—absent a showing of good cause. Mont. R. Admission to Bar §6(C). Repeat out-of-state defendants like BNSF are thus severely hampered in their choice of counsel. Finally, once they are haled into Montana state court, FELA defendants like BNSF cannot even avail themselves of removal into federal court, which is forbidden in FELA actions. *See* 28 U.S.C. §1445(a). This inability to remove

FELA actions ordinarily creates no great unfairness because out-of-state defendants lacking sufficient contacts with a forum can raise a defense of improper personal jurisdiction. But if personal jurisdiction limitations are disregarded, as is now the case in Montana, FELA defendants like BNSF face a double dose of unfairness: they can be sued far from home and yet can neither remove to federal court, nor successfully invoke the protections of due process.

The consequences of the Montana Supreme Court's decision may not be limited to FELA, however. If affirmed, the Montana Supreme Court's decision would almost certainly be invoked by enterprising plaintiffs' lawyers bringing other claims that arise from actions BNSF or similarly situated defendants take anywhere else in the United States, if not the world. After all, while this case arises in the FELA context, the Montana Supreme Court's casting aside of *Daimler* did not turn on FELA. Invoking the logic of the decision below, plaintiffs could ask *any* state court to decide that virtually *any* state or federal statute with a generous venue provision authorizes general personal jurisdiction. And if the defendant is a U.S. defendant, the plaintiffs would almost certainly claim that the constitutional limitations this Court has set forth are irrelevant to that statutory construction. The prospect of unpredictable and potentially costly litigation wrought by the decision below is particularly daunting for small businesses, which often lack the resources to adequately defend themselves in distant and unfamiliar forums. Thus, unless this Court reverses the Montana Supreme Court's decision, it will be impossible for BNSF and

other "[potential] defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 762.

The Montana Supreme Court's decision also needlessly reintroduces complex factual inquiries into what should be clean-cut jurisdictional analyses. When the Court explained in *Daimler* that a corporation is typically at home only where it is incorporated or has its principal place of business, it noted that these "affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." 134 S. Ct. at 760. Such "[s]imple jurisdictional rules ... promote greater predictability," *id.*, which is beneficial both to potential defendants structuring their affairs and to "plaintiffs deciding [where] to file suit," *Hertz*, 559 U.S. at 95. The Montana Supreme Court's decision, however, moves past these "paradig[m] ... bases for general jurisdiction," *Daimler*, 134 S. Ct. at 760, and requires investigation into whether "[a] nonresident defendant ... maintains 'substantial' or 'continuous and systematic' contacts with Montana." Pet.App.16a. This "factually intensive" inquiry, *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 339 (5th Cir. 1999), is sure to "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims," *Hertz*, 559 U.S. at 94.

Finally, the Montana Supreme Court's decision imposes unnecessary burdens on state courts—especially trial judges—opening them up to claims

that have nothing to do with their state. Indeed, one of the trial court judges below complained that he alone had "about 12 FELA cases pending where the Plaintiff is not a Montana resident and where there are no Montana related acts or omissions." Pet.App.36a-37a. While "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors," *Burger King*, 471 U.S. at 473—albeit an interest that cannot negate an out-of-state defendant's due process rights—Montana has no similar interest in ensuring that nonresident plaintiffs are made whole by nonresident defendants. *Cf. CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987) ("Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*."). Thus, fair play, substantial justice, and good sense dictate that such claims be brought where the cause of action arises or where the defendant is at home.

IV. The Decision Below Reflects A Pattern Of State Courts' Evading This Court's Jurisdictional Holdings.

"[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quotation marks omitted). Thus, when this Court issues "an authoritative interpretation" of federal law, "the judges of every State must follow it." *Id.*; *see also* U.S. Const. art. VI, cl. 2 ("[T]he Judges in

every State shall be bound" by "the Laws of the United States").

Daimler made clear that, except "in an exceptional case," an out-of-state corporate defendant can be properly subjected to general personal jurisdiction only where it has "its formal place of incorporation or principal place of business." 134 S. Ct. at 761 n.19. The Montana Supreme Court's reasons for nevertheless exercising general personal jurisdiction over an out-of-state defendant "fail to meaningfully distinguish that case." *Bullock*, 132 S. Ct. at 2491.

This is not the first time the Montana Supreme Court has relied on demonstrably dubious reasoning to defy the decisions of this Court. Just a few years ago, the Montana Supreme Court's willingness to discard controlling Supreme Court precedent was on display when the Montana court attempted to exempt Montana from the reach of *Citizens United v. FEC*, 558 U.S. 310 (2010). *See W. Tradition P'ship, Inc. v. Attorney Gen. of State*, 271 P.3d 1 (Mont. 2011). Plaintiffs brought a First Amendment challenge to a Montana state law that prohibited "political expenditures by corporations on behalf of or opposing candidates for public office." *Id.* at 3. The Montana Supreme Court recognized that "[a] premise of *Citizens United* was that First Amendment protections extend to corporations." *Id.* at 5. But the court maintained that "*Citizens United* was a case decided upon its facts, and involved 'unique and complex' rules" that applied to federal elections. *Id.* The court then identified several aspects of Montana's history, economy, and geography that

allegedly established that "Montana has unique and compelling interests" sufficient to sustain the statute under *Citizens United*. *Id.* at 11.

Two justices dissented. Justice Baker accused the majority of "inventing distinctions in what I fear will be a vain attempt to rescue Montana's" law. *Id.* at 14. Justice Nelson was even more critical, assailing the majority's "decision to parse *Citizens United* in a fashion so as to 'send a message' to, or be the next 'test case' before, the Supreme Court." *Id.* at 36. He blasted the majority's attempt to "render Montana exempt from *Citizens United*," as "disingenuous." *Id.* at 17, 36. He concluded by forecasting that, "[w]hen this case is appealed to the Supreme Court, ... a summary reversal on the merits would not surprise me in the least." *Id.* at 36 (citation omitted).

Fewer than six months later, this Court made Justice Nelson's warning prophetic and summarily reversed. *Bullock*, 132 S. Ct. at 2491. The Court held that "[t]here can be no serious doubt" that "the holding of *Citizens United* applies to the Montana state law." *Id.* The Court noted that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *Id.*

The Montana Supreme Court has also tried to exempt Montana from this Court's Federal Arbitration Act jurisprudence. In *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994), the court refused to enforce a contractual arbitration provision because the provision did not comply with a state law that required arbitration provisions to appear on the

front page of a contract. This Court granted, vacated, and remanded that decision for further consideration in light of *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995), which reaffirmed that, under the FAA, states could invalidate arbitration clauses only on grounds that apply equally to any contract. *Doctor's Assocs., Inc. v. Casarotto*, 515 U.S. 1129 (1995). On remand, even though the Montana law clearly "singl[ed] out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), the Montana Supreme Court simply reinstated its opinion "without inviting or permitting further briefing or oral argument," *id.* at 686. This Court swiftly granted certiorari and reversed, holding that the Montana law was preempted by the FAA. *Id.* at 688-89.

While the Montana court's questionable reasoning in *Casarotto* could be interpreted as a subtle attempt to test the boundaries of this Court's reasoning, the reactions of two Montana justices to the Court's second decision in the case made clear that outright insubordination drove their decisionmaking. After this Court sent the case back to the Montana Supreme Court a second time, two of the court's justices refused to sign a routine order remanding for further proceedings; they proclaimed that they could not "in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the United States Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." Richard C. Reuben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16.

The Montana Supreme Court's decision here is of a piece with those earlier decisions. The court unconvincingly parsed *Daimler* in an effort to give it the minimum possible impact, implausibly limiting it to purely international disputes. But "foreign" in the personal jurisdiction context is used in contradistinction to the domestic or home-state forum and is synonymous with "out-of-state." Indeed, *Daimler* explicitly applies to both "sister-state" and "foreign-country ... corporations." 134 S. Ct. at 754. Likewise, the court disregarded basic hornbook law when it concluded that FELA's venue provision could expand personal jurisdiction at the expense of defendants' constitutional rights. In short, just as "[t]here is no 'Montana exception'" to *Citizens United*, *W. Tradition*, 271 P.3d at 19 (Nelson, J., dissenting), there are no statutory or geographic exceptions to *Daimler*.

The Montana Supreme Court is not alone in resisting the clear import of *Daimler*. While the Montana Supreme Court attempted to circumvent *Daimler* by recasting principles of general personal jurisdiction, several other courts similarly seeking "to mitigate the consequences of *Daimler*'s restrictions on general jurisdiction" have resorted to "a more liberal view of 'related contacts' for specific jurisdiction." Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 685 (2015). In so doing, the highest judicial tribunals in several other states have begun to dismantle this Court's careful limits governing state courts' exercise of personal jurisdiction and, consequently, to sow

widespread confusion over the constitutional boundaries.

For example, the Supreme Court of California has sought to eviscerate the limits set by this Court on general jurisdiction through a sweeping expansion of specific jurisdiction. In *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016), *cert. granted*, No. 16-466, 2017 WL 215687 (U.S. Jan. 19, 2017) (mem.), the court addressed claims against nonresident defendants wholly unrelated to the defendants' contacts with California. This Court's decisions in *Daimler* and *Goodyear* foreclosed any reliance on general jurisdiction because the nonresident defendants were not "at home" in California, and indeed the California Supreme Court held that general jurisdiction would not lie. *Id.* at 883-84. Remarkably, though, the Court did not dismiss the claims. Instead, after paying lip service to this Court's recent general jurisdiction jurisprudence, a badly divided court effected a blatant end-run around those decisions by adopting a capacious specific jurisdiction theory manufactured from whole cloth. Specifically, it announced a "sliding scale approach to specific [personal] jurisdiction," under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim," such that specific personal jurisdiction may be appropriate even in the absence of a direct factual relationship between the plaintiffs' claims. *Id.* at 889.

Similarly, two recent decisions from the Supreme Court of Texas have chipped away at other bedrock

principles of personal jurisdiction. First, in *Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P.*, 493 S.W.3d 65 (Tex.), *cert. dismissed*, 137 S. Ct. 615 (2016), the court weakened the rule that due process must be satisfied as to each defendant, *see, e.g.*, *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). *Cornerstone* addressed whether specific personal jurisdiction could be asserted over nonresident partnerships that had established nonresident subsidiaries to facilitate the purchase of assets in Texas. While this Court in *Daimler* and *Goodyear* suggested that one party's contacts can be imputed to another party under very limited circumstances, the *Cornerstone* plaintiffs waived reliance on that theory, which should have ended the case. But the Supreme Court of Texas upheld specific personal jurisdiction because the partnerships had "targeted Texas assets in which to invest and sought to profit from that investment." 493 S.W.3d at 73-74. Second, in *T.V. Azteca S.A.B. de C.V. v. Ruiz*, 490 S.W.3d 29 (Tex. 2016), *petition for cert. filed*, No. 16-481 (U.S. Oct. 7, 2016), the court adopted a broad version of the "effects" test that this Court had conspicuously narrowed in *Walden*, thereby permitting nonresident defendants' alleged efforts to "serve the market" in Texas to satisfy specific personal jurisdiction. *Id.* at 46.

These recent cases underscore the need for the Court in *this* case to emphatically reaffirm its "authoritative interpretation" of the Due Process Clause to ensure that "the judges of every State ... follow it." *DIRECTV*, 136 S. Ct. at 468. To effect an end-run around fundamental personal jurisdiction principles articulated by this Court, the Montana

Supreme Court brazenly ignored *Daimler*'s clear teaching on personal jurisdiction and suggested that Congress may authorize what the Constitution clearly prohibits. As Justice Nelson of the Montana Supreme Court recognized when he broke with his colleagues five years ago, a state court must resist the "call ... to thumb its nose at the federal government, to disregard federal law, and to boldly ignore the Supremacy Clause." *W. Tradition*, 271 P.3d at 19 (Nelson, J., dissenting). And when, as here, a state court has ignored federal law, it is imperative that the Court make clear that its decisions must be followed.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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